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IN THE

# Supreme Court of the United States

October Term, 1953

No. 31

BALTIMORE CONTRACTORS, INC.,

*Petitioner,*

vs.

JACOB H. BODINGER

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 626

BALTIMORE CONTRACTORS, INC.,

*Petitioner,*

vs.

JACOB H. BODINGER

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss petitioner's appeal is dated December 11, 1953 and reads as follows:

> "Motion granted. See Morgantown vs. Royal Ins. Co., 337 U. S. 254" (R. 22).

The opinion of the United States District Court for the Eastern District of New York denying petitioner's application for a stay pursuant to Section 3 of the United States Arbitration Act appears in the record (R. 21-22).

## Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22), and the jurisdiction of this Court is invoked under 28 USCA 1254(1).

## Question Presented

Whether an order entered in an action in equity for an accounting (in which no answer or other pleading by defendant has been interposed), denying the defendant's motion to stay such equity action under Section 3 of the Arbitration Act, should be regarded as a denial of an interlocutory injunction within the meaning of 28 USCA 1292(1).

## Statutes Involved

Title 28 USCA, Section 1292(1):

> "*Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *;".

9 USCA 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue refer-

able to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

## Statement

The action herein is brought in equity for an accounting of the profits of a joint venture between respondent and petitioner (R. 6-13). The agreement between the respondent and petitioner concerning the said joint venture is in writing and is annexed to the complaint in the action (R. 14-21). The action was commenced by respondent in the Supreme Court of the State of New York, County of New York, and was removed at the instance of petitioner on the ground of diversity of citizenship to the United States District Court for the Eastern District of New York (R. 3). Petitioner, the defendant in the said action, served no answer or other pleading (R. 3), but instead made a motion for a stay of the action, under Section 3 of the United States Arbitration Act, upon the alleged ground that the written agreement provided for arbtiration of the matters in dispute (R. 2, 5). The District Court held there was no agreement to arbitrate (R. 21-22) and made an order denying petitioner's application for such stay (R. 5-6), from which order petitioner appealed to the United States Court of Appeals for the

Second Circuit (R. 4). The Court of Appeals dismissed petitioner's appeal on the ground that the order denying petitioner's application for a stay under Section 3 of the Arbitration Act was not appealable (R. 22).

## ARGUMENT

Petitioner's contention that an order granting or denying a stay pursuant to Section 3 of the United States Arbitration Act (9 USCA 3) constitutes, in and of itself, a grant or denial of an interlocutory injunction within the meaning of 28 USCA 1292(1), completely ignores the uniform decisions of this Court establishing that a grant or denial of such an arbitration stay, or any other stay, does not constitute an interlocutory injunction, unless the stay is granted or denied by a court of equity and is intended to operate against an action *at law*.

1. Petitioner's brief does not expressly concede that the action herein is one in equity, although that concession is implicit in its argument. In any event, there should be no question that the action herein for an accounting of the profits of a joint venture between respondent and petitioner *is one in equity* and not at law. *Valdes* v. *Larrinaga*, 233 U. S. 705, 709; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514-515.

2. The rule is that an order granting or refusing a stay, if made in the case in which the desired stay would operate, does not amount to a grant or denial of an injunction. It is only when the grant or denial of the stay is made in

a case other than that in which the stay would operate, that the stay is deemed to amount to an injunction. (*Emery* v. *Central Trust & Safe Deposit Co.*, 204 F. 965, 968.)

3. The decision of this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, created the concept that, under certain special and precise circumstances, two separate actions, one at law and one in equity, are deemed to be present within the framework of what is regarded conventionally as a single case, so that a stay of the law side of the action until the determination of the equity side of the action will be regarded as an injunction by a court of equity against the action at law and, therefore, appealable under Section 129 of the old Judicial Code.

The *Enelow* case involved an action at law to recover the proceeds of a life insurance policy, to which the defendant interposed an equitable defense that the policy had been obtained by fraud. Defendant then requested a trial "by a Chancellor according to equity procedure in advance of the trial by a jury at law of any purely legal issues", pursuant to Section 274b of the old Judicial Code (former 28 USC, Sec. 398), which authorized the interposition of equitable defenses in an action at law and provided that "The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea." The District Court granted the petition. The plaintiff appealed and; upon affirmance by the Circuit Court of Appeals, the Supreme Court granted certiorari. The Supreme Court Chief Justice Hughes writing the opinion, held that the District Court's order essentially was the grant of an injunction by a court of equity against an action at law pending in a court of law, and hence was appealable. This

holding depended upon the Court's analysis of Section 274b and upon "the established distinction between 'proceedings at law and proceedings in equity in the National courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.'" Thus, the Court there evolved the theory that one court (of equity) was staying another court (of law), and thereby enjoining the latter's proceeding, although the entire action took place under the title of a single action.

The *Enelow* decision made it clear that if the stay was not issued by a court of equity, or if it did not operate against an action at law, it would not amount to an injunction. Mr. Justice Hughes stated (293 U. S. at p. 382): "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Section 129 (and at p. 383) "It is thus apparent that when an order or decree is made under Section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The *Enelow* doctrine never has been extended, but remains restricted to a situation wherein an action at law is stayed solely on equitable principles in furtherance of an equitable defense pleaded in the answer.

The same special situation that existed in the *Enelow* case, *viz.*, an action at law being stayed on the basis of an

equitable defense set up in an answer, was presented to this Court later in the same year (1935) in *Shanferoke C. & S.* v. *Westchester S. Corp.*, 293 U. S. 449, wherein the action was to recover damages for breach of contract, to which the defendant by answer set up a special defense based upon an arbitration agreement, and then made a motion to stay the action pursuant to 9 USCA 3, until arbitration should be had. This court, applying the same theory it had evolved in the *Enelow* case earlier that year, held that the denial of the defendant's motion was the equivalent of the denial of an injunction, stating (293 U. S. at 452): "For the reasons stated in Enelow v. New York L. Ins. Co., an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Sec. 274b, USC title 28, Sec. 398, is appealable under Sec. 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Sec. 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense."

Petitioner's argument that the *Shanferoke* decision holds that the arbitration stay *per se* constitutes an injunction, without regard to whether it is directed against an action at law or in equity, or whether it is based on a special equitable defense or not, is specious and completely ignores the above-quoted language of the decision which plainly holds that an arbitration stay, like any other stay, amounts to an injunction only when, as in the *Enelow* case, it is directed against an action at law in furtherance of an equitable defense pleaded in the answer.

Petitioner's claim that an arbitration stay is possessed *in itself* of some mysterious and unexplained qualities

which constitute it an injunction, without regard to the circumstances under which it is sought to be employed, is not borne out by the language of the statute authorizing such a stay (9 USCA 3) or the applicable decisions. To the contrary, the succeeding decision of this Court on the subject (*Schoenamsgruber* v. *Hamburg Amer. Line*, 294 U. S. 454) confirmed, as did the *Shanferoke* decision, that an arbitration stay, like any other type of stay, can be deemed an injunction only when directed against an action at law in furtherance of a special equitable defense pleaded in the answer.

The *Schoenamsgruber* case involved an action on a libel in admiralty claiming damages for personal injuries incurred on the defendant's steamship. The answer to the libel set up the defense that the contract of passage required the arbitration of claims. The defendant then applied for a stay of the action pursuant to the Arbitration Act (9 USCA 3), which was granted by the District Court. The Circuit Court of Appeals dismissed the appeal from the order granting the stay, holding the same to be interlocutory and not appealable, and this Court granted certiorari.

This Court, in affirming the holding of the Circuit Court of Appeals in the *Schoenamsgruber* case, pointed out that neither *Enelow* nor *Shanferoke* was authority for a ruling that the arbitration stay in the *Schoenamsgruber* case was appealable as an injunction, since the action in the latter case was in admiralty and not at law. The Court said (294 U. S. at p. 456-457):

> "Abandoning their claims that the orders are final, petitioners by supplemental brief argue that

> they are appealable under §129, U. S. C. title 28, §227. They rely on the Shanferoke Case. That decision was based on the Enelow Case. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown in the Enelow Case, they are not interlocutory injunctions within the meaning of §129. And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor."

The *Schoenamsgruber* decision also pointed out (at p. 457) that admiralty courts lack general equitable jurisdiction and do not issue injunctions except in certain limited instances having no application to arbitration matters. This latter point, in itself, refutes petitioners contention that an arbitration stay *per se* constitutes an injunction, since an admiralty court, although without power to issue an injunction could, and did, grant arbitration stay.

The decision of this Court in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 held that the *Enelow doctrine* continued to prevail despite the intervening statutory changes which removed some of the procedural distinctions between actions at law and those in equity (Rule 2 of Rules of Civ. Proc.). It is to be noted that the *Ettelson* case presented the classic *Enelow* situation, viz., an action at law sought to be stayed on the basis of an equitable defense pleaded in the answer.

The limitations of the *Enelow* doctrine still stand, and the requirements for the legal fiction created by that case and followed by *Shanferoke* never have been relaxed. If *Enelow* has not been overruled by *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, the latter case at least has made it plain that the special circumstances required in *Enelow* to constitute a stay as an interlocutory injunction will not be deviated from by one iota.

The *Morgantown* case involved an equitable action to reform an insurance policy, to which the defendant filed a counterclaim to recover the proceeds of the policy. Defendant's motion for a jury trial of the action was denied by the District Court, and the defendant appealed to the Court of Appeals from the order denying its demand for a jury trial, claiming that such order constituted an injunction against the maintenance of its action at law on the policy. The Court of Appeals, holding the order to be non-appealable, dismissed the appeal, and this Court granted certiorari. Since the language of Mr. Justice Frankfurter, in his opinion concurring with the majority in the *Morgantown* case, makes plain why the stay in the case at bar could not constitute an interlocutory injunction, we beg to quote therefrom (337 U. S. at pp. 260-1):

> "The facts, therefore, are precisely the opposite of those in the Enelow Case. Here there was no intervention by a court of equity in proceedings at law, but 'a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' 293 U. S. at 381, 382. * * *

> "A layman may see no difference between the postponement by a trial judge of an action at law, and the postponment of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable. The Enelow and Ettelson Cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves Enelow and Ettelson untouched."

Thus, if *Enelow* and *Shanferoke* still stand at all, their requirements must at least be strictly met to constitute any stay as an appealable injunction.

The very first of these requirements, that the action sought to be stayed be one *at law,* is lacking in this case since, as shown above, the action herein is *in equity.*

The requirement that the action sought to be stayed be at law is not specious or arbitrary. It is basic to the legal fiction that two separate actions—two sides of the court—are operating, one against the other, under the caption of a single case. Aside from the fact that both *Enelow* and *Shanferoke* were rationalized on the basis of Sec. 274b of the old Judicial Code, which applied only to actions at law wherein equitable defenses or cross-bills were interposed, it further remains that *an injunction may be granted only by a court of equity* "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction" (293 U. S., at pp. 382, 383). Since the stay,

to be deemed an injunction, must be granted by a court of equity, it must be directed against the other side of the court—the law side—to create the legal fiction that one side of the court is staying the other side. Furthermore if the stay, to be an injunction, must be granted by a court of equity, and if the action sought to be stayed were also in equity, there would be only one indivisible action, and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, which conceives two actions, one operating against the other, within a single case heading. Thus, the fact that the case at bar, sought to be stayed by petitioner, is in equity and not at law, is sufficient to establish that the denial of petitioner's arbitration stay did not amount to a denial of an injunction.

With the exception of *Hudson Lumber Co.* v. *U. S. Plywood Corp.* (CA 9), 181 F. 2d 929, the Courts of Appeals of the various Circuits seem to have found no difficulty in understanding that it is a basic requirement of the *Enelow* and *Shanferoke* decisions that the action sought to be stayed must be at law, in order that the stay be deemed injunction; and with the exception of the said *Hudson Lumber* case we have found none in which a stay was deemed to be an appealable injunction, unless the action sought to be stayed was one at law. Thus, in *International Union* v. *Colonial Hardwood*, 168 F. 2d 33, *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F. 2d 115, and *Markel Electric Prod. Inc.* v. *United Elec. Radio and Machine Workers, etc.*, 202 F. 2d 435, all cited by petitioner, each of the actions sought to be stayed was at law to recover damages for breach of contract.

It was only in the *Hudson Lumber* case (181 F. 2d 929, 930) that the action stayed was one in equity; and upon that

single decision petitioner predicates its claim of a "conflict". However, the decision of the Court of Appeals for the 9th Circuit in the *Hudson Lumber* case fails completely to show upon what basis, or by what process of reasoning, it arrived at its perfunctory conclusion that the order granting a stay there was appealable as an injunction. The said decision merely cited in a footnote (181 F. 2d at p. 930) the *Enclow* and *Shanferoke* cases and decisions of Courts of Appeals, *in all of which the actions sought to be stayed were at law.* The *Hudson Lumber* case, therefore, does not create a "conflict" in the true sense of the term, but appears to be nothing more than a misunderstanding, without reasoning or explanation given, of the cases it cited in its footnote and of the uniform decisions of this Court. This misunderstanding by the Court of Appeals for the 9th Circuit may have been contributed to by the fact that no issue was raised in that case as to the jurisdiction of the appeal, such jurisdiction having been perfunctorily conceded in the appellee's brief. Certainly the *Hudson Lumber* case does not appear to furnish any occasion for this Court to reconsider its uniform decisions on the subject.

4. If the action herein had been at law, and not in equity, the stay sought by petitioner still would have failed to achieve the status of an injunction because of the lack of a special equitable defense pleaded in an answer. As shown above, an injunction may only be issued by a court of equity on equitable principles (293 U. S. at pp. 383, 383) and must constitute an "intervention by a court of equity" (337 U. S. at p. 261). Here, however, the arbitration stay sought by petitioner pursuant to 9 USCA 3 was merely one for relief under a statute which precluded any discretion-

ary or equitable considerations by the court. The determination of petitioner's application for such stay depended merely upon whether or not there was an agreement to arbitrate the disputed issues, and that determination did not, and could not, involve the exercise by the District Court of the discretion essential to the consideration of an injunction or other equitable relief (*American Locomotive Co.* v. *Chemical Research Corp.* (CA 6), 171 F. 2d 115, 122). Therefore, when not based upon a special equitable defense, the motion for an arbitration stay is devoid of any equitable character.

In *Shanferoke,* as in *Enelow,* the stay was regarded as equitable, because it was based on a special equitable defense pleaded in the answer (293 U. S. at p. 452). Here, however, the petitioner interposed no answer, defense or pleading of any kind, but merely made a motion pursuant to 9 USCA 3 (R. 3). Therefore, there was no special equitable defense pleaded by the defendant to which the application for a stay could be attributed, and from which it might be deemed to have acquired equitable characteristics. As stated in *Gatliff Coal Co.* v. *Cox,* 142 F. 2d 876, 879, which involved an arbitration stay directed against an action at law, "* * * the Supreme Court held that an order granting a stay of proceedings which was based on an equitable defense or cross-bill interposed in an action at law was an appealable interlocutory order * * * A special defense setting up an arbitration agreement is an equitable plea and the denial of a motion for a stay under the Arbitration Act, 43 Stat. 883, Title 9 USCA §3 is the denial of an application for an interlocutory injunction based on a special defense. *Shanferoke Company* v. *Westchester Company, supra.*" Furthermore, the existence of only one

pleading in the case—the complaint—without any pleading at all of the defendant, precludes even an illusion that there are two actions in this case, one staying the other; and without that the stay cannot in any event be deemed an injunction.

5. Petitioner's argument that it is deprived of a right of appeal by respondent's selection of an equitable form of action overlooks two facts (i) that on the basis of the allegations of the complaint (R. 10-12), respondent had no choice but to bring this action in equity for an accounting instead of at law for damages; (2) that if petitioner's motion for a stay had been granted instead of denied, respondent would have had no right to appeal from the grant of such stay.

6. Petitioner's brief, in complaining that the order denying its stay "in effect, is an injunction denying enforcement of substantial arbitral rights" (p. 14), completely ignores the facts, as well as the law. Petitioner controlled whatever was or was not done under the so-called "arbitration" clause herein, since petitioner's president, Frenkil, had the sole power to appoint the accountants to act thereunder (R. 3, 18). This action has been pending almost a full year without having been noticed for trial because of the non-service of an answer by petitioner (R. 3, 28). If there had been anything to be done under the said clause, petitioner had more than ample time to have it done; and in that, petitioner was in no way hampered or delayed, much less enjoined, by the denial of a stay. It would seem that petitioner's sole interest in the said clause was in its effectiveness in delaying, if not staying, this action.

## CONCLUSION

The order denying petitioner's application for a stay pursuant to 9 USCA 3 did not constitute an interlocutory injunction and was not appealable under 28 USCA 1292(1). It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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